89-309

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

SEVEN STAR, INC., a California corporation; and
ELLUZ CORPORATION, a California corporation,

v.

THE UNITED STATES OF AMERICA;
THE IMMIGRATION AND NATURALIZATION SERVICE;
and ERNEST E. GUSTAFSON, JR.,
District Director, Los Angeles District Office,
Immigration and Naturalization Service

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAURENCE A. SPEISER, ESQ.
302 East Carson Ave., #1000
Las Vegas, Nevada 89101
(702) 382-2583
Counsel of Record

JOHN A. JOANNES —
3600 Wilshire Blvd.
Suite 2212
Los Angeles, California 90012
Attorneys for Petitioners

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit erroneously determined that the Fifth Amendment guarantees of equal protection do not apply to the Immigration and Naturalization Service's evaluation of applications for temporary workers under 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

RULE 28.1 LISTING

Petitioners have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1

TABLE OF CONTENTS OF PETITION

TABLE OF CONTENTS OF APPENDICES

TABLE OF AUTHORITIES CITED

Cases

Constitution

Statutes

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

SEVEN STAR, INC., a California corporation; and
ELLUZ CORPORATION, a California corporation,

v.

THE UNITED STATES OF AMERICA;
THE IMMIGRATION AND NATURALIZATION SERVICE;
and ERNEST E. GUSTAFSON, JR.,
District Director, Los Angeles District Office,
Immigration and Naturalization Service

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reprinted in Appendix A hereto, pages A1-6, infra.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on April 24, 1989. A petition for rehearing was denied on June 8, 1989 and is reprinted in Appendix B hereto, page B-1, infra. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

Petitioners, on September 1, 1987, filed blanket applications for temporary workers under 8 U.S.C. § 1101(a)(15)(H)(ii)(b). This provision allows employers to hire workers for a temporary period of time who would ordinarily not legally be entitled to be employed in the United States. In this case such relief was requested to allow Petitioners to maintain their existing work force for a period of time during which they could come into compliance with the Immigration Reform and Control Act. One

of the primary requisites that must be shown to qualify for temporary workers is that the job is not permanent.

Petitioners' applications were denied by the Department of labor on October 21, 1987, and were also denied by the Immigration and Naturalization Service on November 19, 1987. That decision was appealed to the Administrative Appeals Unit of the Immigration and Naturalization Service, the final level of administrative appeal, in December, 1987. Petitioners, through an action filed in United States District Court for the Central District of California on November 16, 1987, sought unsuccessfully to obtain injunctive relief against the Immigration and Naturalization Service from taking any action against them or their employees pending their administrative remedies being exhausted. This request was made upon the grounds that Petitioners would be deprived of their Fifth Amendment right to procedural due process without such relief. Such was the case, since a favorable decision by the Administrative Appeals Unit would be meaningless if the employees, for whom temporary work status was being sought, had been deported and the businesses destroyed prior to a favorable decision by the appeals unit. As of this date a decision by said appeals unit has not been rendered.

In regards to the relief sought from the District Court, Petitioners attempted to present evidence that in a similarly situated business, the horse racing industry, the Immigration and Naturalization Service had, since 1986, granted applications for temporary workers and therefore Petitioners had been denied their right to equal protection under the law as guaranteed by the Fifth Amendment of the United States Constitution. In particular, Petitioners sought to call as a witness the Regional Commissioner of the Immigration and Naturalization

Service, Mr. Ezell, to establish the similarity between the businesses. Petitioners' Offer of Proof, which was denied, is reprinted in Appendix C hereto, pages C1-4, infra.

During the course of the trial the District Court received argument from Attorney Bonaparte as an Amicus Curiae on the issue of the similarity of the businesses. He stated:

> MR. BONAPARTE: "Thank you, your Honor. First, I apologize if during my argument I tend to testify instead of argue. I have a problem in that the horsemen's case was my case. I drafted the order on the H-2's, I drafted the work before the Department of Labor, the work that was attached to Mr. O'Kane's declaration and the orders that were signed by the Immigration Service. Unfortunately . . . or fortunately, when we talk about the offer of proof as far as Mr. Ezell is concerned, I was present in all those conversations because they were with me. So I'm going to try to not testify.
>
> And second, I want to confine my argument to the point raised by the other amicus, the issue of temporary. Because it's my belief that whatever decision your honor makes that there should be a holding that the Plaintiff's offer satisfies the statutory term 'temporary' as that is used in the 1986 amendments to the Immigration and Nationality Act. Because as your Honor is aware, the H-2 provision was amended at that time and liberalized.
>
> The problem that I had when I saw this case initially was that the same basis that was used to define 'temporary' in the horsemen's case is exactly present here. And that, I don't think, has been stressed. And that is the question of state law or

municipal law as far as the licenses are concerned. In the horsemen's case it was impossible to make a permanent job offer to a group or an exercise rider by the HBPA simply because under state law the operating licenses of the different tracks were one year in length only and expired at the end of a year. And because you had a job that expired at the end of a year it was impossible to get a permanent position. It was temporary. It's the same situation that we have here. Attached as one of the exhibits —

THE COURT: Every business license is on an annual basis, isn't it? So every business position is temporary in that sense, isn't it?

MR. BONAPARTE: Not necessarily, your Honor. When you have businesses that are subject to police licenses enforcement licenses . . . for example, on the tracks they are subject to an enforcement license with inspections by the California Horseracing Bureau. As far as the Plaintiff's business is concerned, they are subject to enforcement licenses with visits by the Los Angeles Police Department. As a lawyer I don't have to have a . . .

THE COURT: They have inspection for cleanliness in which the inspecting authority can shut them down if they find them improper. Every manufacturing establishment has safety requirements. OSHA can shut them down. Isn't this the same argument that can be made for all of those?

MR. BONAPARTE: But as lawyer I have to get a license but I don't need a police permit. A police department permit is an enforcement-type device in the same way on a track. You need an enforcement-type of license. A groom or an exercise rider that are

riding on a ranch does not need a license from the State Horseracing Bureau. They can just go and take the job. They do not need a license. The dancehall girl or a dancehall itself needs a license and a police permit. That is different than a business permit. And these are renewable annually. So what we have are two businesses that in effect have to be run with licenses that are police-type enforcement licenses.

Now, what you saw in the letters that were attached to Mr. O'Kane's declaration that were sent as a result of questions by the Department of Labor in effect were a summary of statements that if this offer had been made for work outside of the track that did not involve police type of licenses. The temporariness would not have been ruled upon and might not have been ruled favorably upon. The only reason was that you had the police-type of license that came down from the State of California that involved people on the track. And that's the only way the H-2's were granted.

The same way here. If what we had was a business . . . like I have to get a license to operate my law business. And that basically is applying for an annual license that is not a police permit. That is a one year police permit in duration. I could not get a temporary license. Now, as a result you have two types of businesses with one year licenses that are police licenses. And those are used basically to define the question of temporary in nature."

The portion of the transcript containing Mr. Bonaparte's testimony is reprinted in Appendix D hereto, pages D1-3, infra.

The District Court entered judgment against Petitioners on December 21, 1987. This judgment is reprinted in Appendix E hereto, pages E1-2, infra. The judgment incorporates the Court's oral findings of fact and conclusions of law. In regards to such the District Court stated as follows in reference to Petitioners equal protection argument:

> "Plaintiffs sought to extend the trial and to go beyond the written evidence by calling the Regional Commissioner, Mr. Ezell, to buttress their claim that the circumstances between the dancehall industry and the racehorse industry are identical and to attempt to show that INS's reasons for granting the H-2 visas to the racehorse industry are equally applicable to and indistinguishable from Plaintiff's reasons for requesting the permits in their cases. Much of the evidence they are talking about presenting to which the Court sustained an objection would have been cumulative.
>
> Also, even if one assumes arguendo that the reasons given by INS . . . their rationale enunciated in their grant of the visas to the racehorse industry . . . is equally applicable to the Plaintiff's industry, even if you assume that arguendo that would not guarantee Plaintiff's likelihood of success in their application. Even on that, arguendo, assumption Plaintiff would not have a valid equal protections challenge to INS's denial of permits to them.
>
> *We are dealing with case-by-case adjudication which does not involve equal protection-type classifications.* There's no equal protections right to equivalency of result in an administrative process that employs a case-by-case adjudication method, especially when we're talking about actions in differ

> ent years and in different industries. The fact that there is no equal protections basis here is especially clear in the immigration field where the INS has been given such vast discretion in the making of individualized "H" visa determination."

These comments are reprinted in Appendix F hereto, page F1-2, infra.

It is clear the District Court did not recognize equal protection principles as being applicable to the Immigration and Naturalization Services' determination under 8 U.S.C. § 1101(a)(15)(H)(ii)(b) as the record contained unopposed statements that at the time of trial the horse racing industry was enjoying the benefits of its granted applications for temporary workers.

The United States Court of Appeals for the Ninth Circuit in its decision in affirming the District Court's decision spoke ambiguously as to Petitioners' claim that it had been denied its right to equal protection. Petitioners initially thought the Court had recognized its right to equal protection under the law, but had not applied it based on the Court erroneously thinking that the horse racing industry had been granted its applications for temporary workers prior to Petitioners' applications for such on a one time basis. Petitioners therefore petitioned for rehearing and stated in its introduction:

> "The Honorable Court rendered its decision adverse to Plaintiffs-Appellants on April 24, 1989. Plaintiffs-Appellants respectfully submit that the Honorable Court overlooked and/or misinterpreted the law and certain facts as follows:
>
> A. The Court failed to interpret 'temporary services or labor' under 8 U.S.C. § 1101(a)(15)(H)(ii) in accordance with the interim final regulations of

the Department of Labor and the Immigration and Naturalization Service as set forth in 20 C.F.R. § 655.100(c)(2)(iii) and 8 C.F.R. § 241.2(h)(3)(iv)(a), respectively.

B. The Court overlooked the fact that the INS has approved, since at least 1986 and every year thereafter, H-2 visas for grooms and exercise riders for the horse racing industry in connection with Plaintiffs-Appellants equal protection argument. The Court's decision would indicate that the Court considered the horse racing industry's H-2 visas to have been granted one time several years ago, such is not the case."

The Petitioners further stated in Paragraph B of its argument:

"The Court overlooked the fact that the horse racing industry has been granted H-2 visas for grooms and exercise riders for every year since at least 1986. The Court seemingly recognizes that equal protection applied to administrative proceedings, however such are not applied by the Court in this case since they have overlooked the fact that H-2 visas have been granted to the horse racing industry every year since at least 1986, and not just many years ago."

Upon the rehearing being denied it appears that the United States Court of Appeals for the Ninth Circuit has affirmed the District Court's ruling that the Fifth Amendment guarantees of equal protection are not applicable to the Immigration and Naturalization Service's determination for applications for temporary workers. This must be the case since there has never been a determination that the Immigration and Naturalization Service's decision in

the horse racing industry was erroneous and in fact they continue to grant such applications of the horse racing industry, which fact was presented to the ninth circuit in oral argument and not opposed by the United States Attorney, who was aware of such.

REASONS FOR GRANTING THE PETITION

It is imperative that the United States Supreme Court not allow the Immigration and Naturalization Service to be able to indiscriminately favor certain similarly situated businesses over others. Such would be allowed if this Court does not grant review and hold that the Fifth Amendment guarantees of equal protection are applicable to applications for temporary workers under 8 U.S.C. § 1101(a)(15)(H)(ii)(b). In *American Federation of Government Employees, AFL-CIO v. United States of America,* 622 F.Supp. 1109 (D.C. Ga. 1984) the Court succinctly states on page 1112 the essence of a claim of denial of equal protection under the Fifth Amendment of the United States Constitution:

[3] The Supreme Court has distinguished between due process and equal protection as follows: 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection', on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. *Ross v. Moffitt,* 417 U.S. 600, 609, 94 S.Ct. 2437, 2443, 41 L.Ed.2d 341 (1974). The court will address the equal protection issue first.

[4] Although the federal government *and its agencies* are not bound by the equal protection clause of the Fourteenth Amendment, the due process clause of the

Fifth Amendment imposes similar, if not identical, limitations on government actions. *See e.g., Jean v. Nelson,* 711 F.2d 1455, 1483 (11th Cir. 1983). Therefore, if a classification is invalid under the equal protection clause of the Fourteenth Amendment, it also is inconsistent with the due process clause of the Fifth Amendment. *NAACP v. Allen*, 493 F.2d 614, 619 n. 6 (5th Cir. 1974).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LAURENCE A. SPEISER, ESQ.
Counsel of Record

JOHN A. JOANNES, ESQ.
Attorney for Petitioners

By LAURENCE A. SPEISER
Counsel of Record

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEVEN STAR, INC., a California corporation;
ELLUZ CORPORATION, a California corporation,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA;
IMMIGRATION AND NATURALIZATION SERVICE;
ERNEST E. GUSTAFSON, JR., District Director,
Los Angeles District Office, I&NS,
Defendants-Appellees.

No. 88-5525

D.C. No. CV-87-7687

OPINION

Appeal from the United States District Court
for the Central District of California
Irving Hill, District Judge, Presiding

Argued and Submitted
March 8, 1989 — Pasadena, California

Filed April 24, 1989

Before: Mary M. Schroeder, Betty B. Fletcher and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY

Immigration and Naturalization

Affirming the district court's order denying injunctive relief, the court held that the district court did not abuse

its discretion in concluding that there was not demonstrated a likelihood of success on the merits of the claim.

Seven Star, Inc. and Elluz Corporation, owners of five ballrooms in Los Angeles that employ workers from Mexico and Central America as dance hostesses, field an action in district court for a temporary restraining order and preliminary and permanent injunctive relief to prevent the Immigration and Naturalization Service (INS) from raiding their businesses and deporting their hostesses pending exhaustion of their administrative remedies concerning the employees' visa petition denials. The district court denied all forms of injunctive relief, holding that the balance of equities did not favor plaintiffs and that plaintiffs had not demonstrated a likelihood that they would prevail on the merits of their position that their employees were entitled to certification as H-2 "temporary" workers.

[1] The record demonstrated that the employees in question were not hired on a seasonal basis or with an understanding that the need for the employment was temporary because nothing in the nature of plaintiffs' business would call for hostess employment on only a temporary basis. These facts did not demonstrate a likelihood of success on the issue of certification of the employees as "temporary" workers. [2] Plaintiffs' claim that the INS previously approved H-2 visas for grooms in the horse racing industry did not give rise to a claim for relief on equal protection grounds because a decision by an administrative agency in one case did not mandate the same result in every similar case in succeeding years.

COUNSEL

Laurence Speiser, Los Angeles, California, for the plaintiffs-appellants.

Michael C. Johnson, Special Assistant United States Attorney, Los Angeles, California, for the defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

Plaintiffs-appellants are the owners of five ballrooms in Los Angeles that employ workers from Mexico and Central America as dance hostesses. The plaintiffs originally applied to the Department of Labor (DOL) for alien employment certification to obtain H-2 temporary worker visas for their hostesses, pursuant to 8 U.S.C. §§ 1101(a)(15)(H)(ii) & 1184(c) and 20 C.F.R. § 655.101. After the DOL denied the visas, the plaintiffs resubmitted their applications to the Immigration and Naturalization Service (INS) Los Angeles district office pursuant to 8 C.F.R. § 214.2. They were again denied.

Plaintiffs filed this action in district court for a temporary restraining order and preliminary and permanent injunctive relief to prevent the INS from raiding their businesses and deporting their hostesses pending exhaustion of their administrative remedies concerning the visa petition denials. The district court denied all forms of injunctive relief.

The district court in effect held not only that the balance of equities did not favor the plaintiffs, but that the plaintiffs had not demonstrated a likelihood that they would prevail on the merits of their position that employees were entitled to certification as H-2 "temporary" workers. The principal question before us is whether the district court abused its discretion in holding that the plaintiffs had not demonstrated a likelihood of success on the merits.

In order to qualify for an H-2 visa, alien workers must show that they have come "temporarily to the United States (a) to perform agricultural labor or services . . . of a temporary or seasonal nature, or (b) to perform other temporary service or labor. . . ." 8 U.S.C. § 1101(a)(15)(H)(ii). The DOL regulation defines "temporary" as "where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year. . . ." 20 C.F.R. § 655.100(c)(2)(iii). The INS regulation uses a similar definition. *See* 8 C.F.R. § 241.2(h)(3)(iv)(A). The regulations do not provide that any worker who works for less than one year is automatically considered to be temporary. The INS determines the permanence of a position by looking to the nature of the employer's need for the duties to be performed, rather than to parties' intentions as to how long any one worker will actually hold a particular job. *Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d 1084, 1088-90 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1473; *In re Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

[1] In this case it is clear that the employees in question were not hired on a seasonal basis or with an understanding that the need for their employment was temporary. Nothing in the nature of plaintiffs' business would call for hostess employment on only a temporary basis.

In order to show their good faith and to establish equities in their favor, the plaintiffs took an unusual step during the course of this litigation. They promised to go out of business within a year of the entry of any injunction. Plaintiffs argue that by agreeing to go out of business they have demonstrated a need for workers that lasts for less than one year. This "need," however, is caused by

plaintiffs' response to the requirement of the regulations and not by the nature of the job. There is no authority in the regulations, their history, or case law to suggest that employees can be deemed "temporary" because their employer plans to go out of business solely to avoid the requirements otherwise imposed on hiring aliens.

Plaintiffs also argue that we must reverse the judgment because they are entitled to discovery in an effort to demonstrate a denial of equal protection. This argument arises from plaintiffs' allegation that some years ago the INS approved H-2 visas for the Horsemen's Benevolent Protective Association for grooms and exercise riders in the horse racing industry. Plaintiffs seek to show that the racing industry employer was "similarly situated" to the dance hall employers in this case.

[2] A claim that an administrative agency has made different decisions in different cases, in different years, does not give rise to a claim for relief on equal protection grounds. Assuming arguendo that the plaintiffs could successfully show some inconsistency in decisions involving these two different industries, equal protection principles should not provide any basis for holding that an erroneous application of the law in an earlier case must be repeated in a later one. Moreover, a decision by an administrative agency in one case does not mandate the same result in every similar case in succeeding years. *See, e.g., Artukovic v. INS*, 693 F.2d 894, 898 (9th Cir. 1982) (collateral estoppel and res judicata are to be applied flexibly in the administrative law context). Our courts have never held that an agency cannot change its collective mind on a legal issue. We have recognized that such changes occur. *See Mesa Verde Const. Co. v. Northern Cal. Dist. Council of Laborers*, 861, F.2d 1124, 1134 (9th Cir. 1988) (en banc) (NLRB "is free to change its interpreta-

tion of the law if its interpretation is reasonable and not precluded by Supreme Court precedent").

The district court did not abuse its discretion in concluding that the plaintiffs had not demonstrated a likelihood of success on the merits of their claim. The district court's denial of injunctive relief is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEVEN STAR, INC., a California corporation;
ELLUZ CORPORATION, a California corporation,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA;
IMMIGRATION AND NATURALIZATION SERVICE;
ERNEST E. GUSTAFSON, JR., District Director,
Los Angeles District Office, I&NS,
Defendants-Appellees.

No. 88-5525
D.C. #CV-87-7687
(Central California)

ORDER

Before: SCHROEDER, FLETCHER, and TROTT, Circuit Judges.

The panel as constituted above has voted to deny Plaintiffs-Appellants' Petition for Rehearing.

APPENDIX C

LAURENCE A. SPEISER, LTD.
JOHN A. JOANNES
3600 Wilshire Boulevard, Suite 2212
Los Angeles, California 90010
(213) 386-0701
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SEVEN STAR, INC., a California corporation
and ELLUZ CORPORATION, a California corporation,
Plaintiffs,

VS.

UNITED STATES OF AMERICA,
THE IMMIGRATION AND NATURALIZATION SERVICE,
AND THE IMMIGRATION AND NATURALIZATION SERVICE,
ERNEST E. GUSTAFSON, DISTRICT DIRECTOR,
Defendants.

CASE NO. CV 87-07687-IH

OFFER OF PROOF

HEARING DATE: December 15, 1987
HEARING TIME: 9:30 a.m.

Plaintiffs per the Court's order of November 18, 1987 make this Offer of Proof in support of the Immigration and Naturalization Service producing for examination at plaintiffs' trial for a Permanent Injunction on December 15, 1987, Harold Ezell, Regional Commissioner. Plaintiffs will inquire of Mr. Ezell as follows:

A. Mr. Ezell's contracts with the horse racing industry in regards to the Horsemen's Benevolent and Protective

Association's application for temporary H-2 visas for 1500 grooms and exercise riders to work on California racetracks made in December, 1985. Specific inquiry will be made of any discussion regarding whether these positions were temporary or permanent under INS regulations and decisions.

B. Mr. Ezell's contacts with the Department of Labor and/or the Immigration and Naturalization Service staff regarding whether the aforementioned positions were temporary or permanent under Department of Labor and/or Immigration and Naturalization regulations and decisions.

C. The specific reasons for determining why the aforementioned positions at racetracks, though ongoing, were temporary.

D. Mr. Ezell's interpretation of the Immigration and Reform Control Acts' effect on the definition of "temporary" under the amended H-2 visa section.

These inquiries will be used to establish that the hostess dance ballroom industry and racetrack industry are similarly situated and therefore must be treated identically. Therefore, if the jobs at racetracks are "temporary" so are those at hostess dance ballrooms. Plaintiffs equal protection argument is set forth in detail in the Supplement Declaration of John O'Kane and the Points and Authorities filed herewith.

Respectfully submitted,

LAURENCE A. SPEISER, LTD.
JOHN A. JOANNES

By LAURENCE A. SPEISER
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE BY MAIL

I, CHARLES S. BEALS, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is 3600 Wilshire Boulevard, Suite 2212, Los Angeles, California 90010; that I am over the age of eighteen years; and am not a party to the above-entitled action.

That I am employed by Laurence A. Speiser, Ltd. and John A. Joannes who are members of the Bar of the United States District Court for the Central District of California at whose direction the service by mail described in this Certificate was made; that on November 25, 1987, I deposited in the United States mails at 3600 Wilshire Boulevard, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of OFFER OF PROOF

addressed to: Michael C. Johnson
Special Assistant United States
Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012

(SERVED BY HAND AT UNITED
STATES ATTORNEY'S OFFICE
11/25/87 at 4:30 p.m.)

at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on November 25, 1987 at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

CHARLES S. BEALS

APPENDIX D

Mr. Bonaparte: Thank you, Your Honor. First, I apologize if during my argument I tend to testify instead of argue. I have a problem in that the Horsemen's case was my case. I drafted the order on the H-2's, I drafted the work before the Department of Labor, the work that was attached to Mr. O'Kane's declaration and the orders that were signed by the Immigration Service. Unfortunately — or fortunately, when we talk about the offer of proof as far as Mr. Ezell is concerned, I was present in all those conversations because they were with me. So I'm going to try to not testify.

And second, I want to confine my argument to the point raised by the other amicus, the issue of temporary. Because it's my belief that whatever decision your honor makes that there should be a holding that the plaintiff's offer satisfies the statutory term "temporary" as that is used in the 1986 amendments to the Immigration and Nationality Act. Because as your honor is aware, the H-2 provision was amended at that time and liberalized.

The problem that I had when I saw this case initially was that the same basis that was used to define "temporary" in the Horsemen's case is exactly present here. And that, I don't think, has been stressed. And that is the question of state law or municipal law as far as the licenses are concerned. In the Horsemen's case it was impossible to make a permanent job offer to a group or an exercise rider by the HBPA simply because under state law the operating licenses of the different tracks were one year in length only and expired at the end of a year. And because you had a job that expired at the end of a year it was impossible to get a permanent position. It was temporary. It's the same situation that we have here. Attached as one of the exhibits —

The Court: Every business license is on an annual basis, isn't it? So every business position is temporary in that sense, isn't it?

Mr. Bonaparte: Not necessarily, your honor. When you have businesses that are subject to police licenses or enforcement licenses — for example, on the tracks they are subject to an enforcement license with inspections by the California Horseracing Bureau. As far as the plaintiff's business is concerned, they are subject to enforcement licenses with visits by the Los Angeles Police Department. As a lawyer I don't have to have a —

The Court: They have inspections for cleanliness in which the inspecting authority can shut them down if they find them improper. Every manufacturing establishment has safety requirements. OSHA can shut them down. Isn't this the same argument that can be made for all of those?

Mr. Bonaparte: But as lawyer I have to get a license but I don't need a police permit. A police department permit is an enforcement-type device in the same way on a track. You need an enforcement-type of license. A groom or an exercise rider that are riding on a ranch does not need a license from the State Horseracing Bureau. They can just go and take the job. They do not need a license. The dancehall girl or a dancehall itself needs a license and a police permit. That is different than a business permit. And these are renewable annually. So what we have are two businesses that in effect have to be run with licenses that are police-type enforcement licenses.

Now, what you saw in the letters that were attached to Mr. O'Kane's declaration that were sent as a result of questions by the Department of Labor in effect were a summary of statements that if this offer had been made

for work outside of the track that did not involve police-type of licenses. The temporariness would not have been ruled upon and might not have been ruled favorably upon. The only reason was that you had the police-type of license that came down from the State of California that involved people on the track. And that's the only way the H-2's were granted.

The same way here. If what we had was a business — like I have to get a license to operate my law business. And that basically is applying for an annual license that is not a police permit. That is a one year police permit in duration. I could not get a temporary license. Now, as a result you have two types of businesses with one year licenses that are police licenses. And those are used basically to define the question of temporary in nature.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SEVEN STAR, INC., et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
IMMIGRATION AND NATURALIZATION SERVICE, et al.,
Defendants.

No. CV 87-7687-IH

JUDGMENT

Trial of the matter came before the Court on December 16, 1987, the Court having previously invoked F.R.Civ.P. 65 and having consolidated plaintiffs' application for preliminary injunction with the trial itself. Appearances were: For plaintiffs, Laurence A. Speiser, Esq., John A. Joannes, Esq., and John O'Kane, Esq. For defendants, Robert C. Bonner, U.S. Attorney by Michael C. Johnson, Special Ass't. U.S. Attorney and M. Pillar Luna, Ass't. Regional Counsel, INS. The Court granted the petition of two amicii curiae to appear, namely International Ladies Garment Workers Union which appeared through Michael Rubin, Esq., and Coalition of Apparel Industries which appeared through Ronald H. Bonaparte, Esq.

The Court, having considered the pleadings and the evidence in the matter, as well as the points and authorities and briefs of both sides, and having heard argument, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiffs shall take nothing by their action. Defendants shall take judgment against plaintiffs with costs of $ _____ .

2. The Court's findings of fact and conclusions of law as well as a statement of the Court's reasons, are encompassed within transcripts of the proceedings in open court on both December 16 and December 17, 1987. Said transcripts are ordered filed when produced and are incorporated herein by reference.

3. The Clerk shall transmit a copy of this judgment by U.S. mail to all counsel of record, including counsel for the amicii.

DATED: December 17, 1987.

IRVING HILL

IRVING HILL, Judge
United States District Court

APPENDIX F

Plaintiffs sought to extend the trial and to go beyond the written evidence by calling the regional commissioner, Mr. Ezell, to buttress their claim that the circumstances between the dancehall industry and the racehorse industry are identical and to attempt to show that INS's reasons for granting the H-2 visas to the racehorse industry are equally applicable to and indistinguishable from plaintiff's reasons for requesting the permits in their cases. Much of the evidence they are talking about presenting to which the court sustained an objection would have been cumulative.

Also, even if one assumes arguendo that the reasons given by INS — their rationale enunciated in their grant of the visas to the racehorse industry — is equally applicable to the plaintiff's industry, even if you assume that arguendo that would not guarantee plaintiff's likelihood of success in their application. Even on that, arguendo, assumption plaintiff would not have a valid equal protections challenge to INS's denial of permits to them.

We are dealing with case-by-case adjudication which does not involve equal protections-type classifications. There's no equal protections right to equivalency of result in an administrative process that employs a case-by-case adjudication method, especially when we're talking about actions in different years and in different industries. The fact that there is no equal protections basis here is especially clear in the immigration field where the INS has been given such vast discretion in the making of individualized "H" visa determination.

Moreover, if the administrative agency is to be accorded the respect which courts are required by decisions of the supreme court to give them — respect to which they

are entitled because of their expertise — agencies have to be given an opportunity to change their minds over time. Merely because they have applied a line of reasoning or articulated a line of reasoning in one case does not automatically entitle every other applicant to the same result because he can marshal a similar argument in his favor. And there is particularly no basis for saying the applicant — new applicant is entitled to the same result where we're dealing with a different industry in a different time.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On August 18, 1989, I served the within Petition for a "Writ of Certiorari in re: Seven Star, Inc. vs. The United States of America" in the United States Supreme Court, October Term 1989, No. . . ., on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Robert C. Bonner
United States Attorney
Frederick M. Brosio, Jr.
Assistant United States Attorney
Chief, Civil Division
Michael C. Johnson
Special Assistant United States Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 18, 1989, at Los Angeles, California.

J. Gordon Hooper

J. GORDON HOOPER